IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, MONTANA ENVIRONMENTAL INFORMATION CENTER, GRAND CANYON TRUST, SAN JUAN CITIZENS ALLIANCE, OUR CHILDREN'S EARTH FOUNDATION, PLAINS JUSTICE, POWDER RIVER BASIN RESOURCE COUNCIL, SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND Plaintiffs, v. SCOTT PRUITT, in his official capacity as Administrator United States Environmental Protection Agency, Defendant.	CIVIL ACTION NO. 1: 11-cv-01548 (ABJ)

EPA'S MOTION TO AMEND THE CONSENT DECREE

The Consent Decree entered in this matter, as amended on December 15, 2015, ECF 86, and corrected on this Court on August 9, 2017, ECF 91, requires that, by September 9, 2017, Defendant Scott Pruitt, Administrator, United States Environmental Protection Agency ("EPA") sign a notice of final rulemaking pursuant to the Clean Air Act's ("CAA") regional haze program, 42 U.S.C. § 7491, to meet the "best available retrofit technology" requirement for electric generating units in Texas. Consent Decree ¶ 4.a.ii. EPA may meet this obligation by: (1) promulgating a federal implementation plan ("FIP"); (2) unconditionally approving a state implementation plan ("SIP"); or (3) promulgating a partial FIP and unconditionally approving a partial SIP that together meet the relevant requirements. *Id.*

Pursuant to Federal Rule of Civil Procedure 60(b)(5) and Local Rule 7, EPA hereby moves the Court to extend the September 9, 2017 deadline until December 31, 2018. The

reasons in support of EPA's motion are explained in the accompanying Memorandum in Support.

Plaintiffs oppose the extension request and will file a response supporting their opposition.

Respectfully submitted,

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NATIONAL PARKS CONSERVATION ASSOCIATION, MONTANA ENVIRONMENTAL INFORMATION CENTER, GRAND CANYON TRUST, SAN JUAN CITIZENS ALLIANCE, OUR CHILDREN'S EARTH FOUNDATION, PLAINS JUSTICE, POWDER RIVER BASIN RESOURCE COUNCIL, SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND Plaintiffs, v. SCOTT PRUITT, in his official capacity as Administrator United States Environmental Protection Agency, Defendant.	CIVIL ACTION NO. 1: 11-cv-01548 (ABJ)

EPA'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE CONSENT DECREE

The Consent Decree entered in this matter requires that, by September 9, 2017, Defendant Scott Pruitt, Administrator, United States Environmental Protection Agency ("EPA") sign a notice of final rulemaking pursuant to the Clean Air Act's ("CAA") regional haze program, 42 U.S.C. § 7491, to meet the "best available retrofit technology" ("BART") requirement for electric generating units ("EGUs") in Texas. Consent Decree ¶ 4.a.i and ii. EPA may meet this obligation by: (1) promulgating a federal implementation plan ("FIP"); (2) approving a state implementation plan ("SIP"); or (3) promulgating a partial FIP and approving a partial SIP that together meet the relevant requirements. *Id.*

EPA hereby moves the Court to extend the September 9, 2017 deadline until December 31, 2018. For years, efforts by EPA to address the BART requirements for Texas EGUs have

been disrupted by litigation. *See infra* at 5-6. Circumstances have changed significantly over the past several months and weeks as EPA and Texas have engaged in a productive level of dialogue that has not occurred in many years. Declaration of Sam Coleman, Acting Regional Administrator, EPA Region 6, ¶¶ 18, 19 (August 15, 2017) (Exhibit 1) ("Decl."); *see also id.* ¶ 15. These discussions have allowed EPA and Texas, and specifically the Texas Commission on Environmental Quality ("TCEQ"), to commit in writing to a cooperative approach – memorialized in a Memorandum of Agreement dated August 14, 2017 ("MOA") - to develop an approvable SIP to address BART for EGUs that would be more consistent with the CAA's preference for cooperative federalism, and would produce a plan that more effectively addresses concerns raised by the State. (The MOA is Attachment A to Mr. Coleman's Declaration). The SIP development approach memorialized in the MOA would also produce an implementation plan to address the interstate transport of pollutants as required by the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(II).[1] Decl. ¶16.

As explained by Mr. Coleman, the MOA provides for Texas to submit a SIP that will address, among other things, the BART requirements for EGUs. Decl. ¶¶ 14-16 and Attachment A (the MOA). The MOA establishes a process whereby the SIP will be submitted and EPA will take final action to approve or disapprove the SIP in whole or in part no later than December 31, 2018. The MOA represents the type of cooperative federalism that is the foundation of the CAA. *See EPA v. EME Homer City Generation, L.P*, 134 S. Ct. 1584, 1602 n.14 (2014) ("recognizing that "cooperative federalism" is a "core principle" of the CAA"). Mr. Coleman further explained, "[t]he recent collaborations between TCEQ and EPA Region 6 have been the closest

[1] As discussed in more detail *infra* at 8-9, the consent decree entered in *Sierra Club v. EPA*, Case No. 10-cv-01541 (CKK) requires EPA to take related actions with respect to these requirements by September 9, 2017. EPA is concurrently filing a motion in that matter seeking the same extension it seeks here.

and most productive discussions in the past five years." Decl. ¶ 19. The commitments in the MOA are an outgrowth of a year of "concerted effort" between EPA and Texas to develop a SIP revision to address these requirements, including BART for EGUs. *Id.* ¶ 15. These discussions were redoubled in Spring 2017 and then began to yield fruit and ultimately culminated in the MOA. *Id.* Allowing time for this process to be completed will promote federalism consistent with the CAA and should more effectively accomplish the goals of the regional haze program. *See* Decl. ¶ 13.

On August 14, 2007, the Governor of the State of Texas and the Chairman of the TCEQ sent a letter to the Administrator of EPA affirming Texas' commitment to establish an approved SIP by end of 2018. The letter states that Texas will "bring the full weight and resources of the State of Texas to bear on" the development of an approvable SIP revision. Letter from Gov. Abbott and B. Shaw, Chairman, TCEQ, to Administrator Pruitt, at 1 (Aug. 4, 2017) (Attachment B to Coleman Decl.) ("Abbott Letter"). *See* Decl. ¶ 18 (discussing the Governor's letter).

BACKGROUND

I. STATUTORY BACKGROUND

The CAA, 42 U.S.C. §§ 7401-7671q, is the principal federal statute designed to "protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). Congress intended that the states would have the primary responsibility for establishing the plans that will implement the requirements necessary to meet the national ambient air quality standards promulgated by EPA, as well as certain other goals specified by Congress. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

A. Implementation Plans

The states are responsible for adopting SIPs, but SIPs must be reviewed by EPA to ensure that they meet the requirements of the CAA. Once a state submits a SIP, EPA must determine within six months whether the SIP is complete. 42 U.S.C. § 7410(k)(1)(A)-(B). If EPA determines that the submission is complete or the submission is deemed complete by operation of law, EPA must take final action within 12 months to approve or disapprove the SIP, in whole or in part. *Id.* § 7410(k)(2)-(3). EPA may disapprove a SIP only if it fails to meet the requirements of the CAA. *Id.* § 7410(k)(3). The CAA imposes a duty on EPA to promulgate a FIP at any time within two years of EPA's finding that a state has failed to submit a required SIP (or that a SIP is incomplete), or after EPA's disapproval of a SIP. *Id.* § 7410(c)(1).

B. Visibility Requirements

Congress added section 169A to the CAA in 1977 to address visibility impairment in certain national parks and wilderness areas that is caused by manmade air pollution (commonly referred to as "regional haze"). *Id.* § 7491(a)(1). Congress required EPA to promulgate regulations requiring states to revise their SIPs to include "such emission limits, schedules of compliance, and other measures as may be necessary to make reasonable progress toward meeting" Congress' national visibility goal. *Id.* § 7491(b)(2). One such measure that Congress deemed necessary was a requirement that certain older, often uncontrolled, major stationary sources "procure, install, and operate . . . [BART]." EPA in turn promulgated regulations requiring states, including Texas, to submit SIP revisions addressing the CAA's visibility requirements, including BART. *See* 64 Fed. Reg. 35,714, 35,737 (July 1, 1999) (*codified* at 40 C.F.R. §§ 51.300-309) (the "Regional Haze Rule"). Among other things, the Regional Haze Rule allows a state to develop an alternative to BART, such as a trading program, if the state can

demonstrate that the alternative provides for greater reasonable progress towards natural visibility conditions. 40 C.F.R. § 51.308(e)(2)-(6). The Regional Haze Rule required states to submit their regional haze SIP revisions to EPA by December 17, 2007. *Id.* § 51.308(b).

II. ADMINISTRATIVE BACKGROUND

In 2009, EPA made a finding that a number of states, including Texas, had failed to submit SIPs to address regional haze. 74 Fed. Reg. 2392, 2393 (Jan. 15, 2009). This finding triggered EPA's obligation to promulgate a FIP at any time within two years to meet the requirements of the CAA and EPA's Regional Haze Rule unless Texas submitted a SIP that EPA then approved. 42 U.S.C. § 7410(c)(1).

On March 31, 2009, Texas submitted a regional haze SIP to EPA that relied on EPA's Clean Air Interstate Rule ("CAIR"), which EPA had promulgated to address a separate CAA provision regarding the interstate transport of pollutants, as an alternative to requiring the state's EGUs to install BART. *See* 77 Fed. Reg. 33,642, 33,653 (June 7, 2012). However, the D.C. Circuit Court of Appeals had invalidated CAIR in 2008 and remanded the rule to EPA (without vacatur) with instructions to develop a replacement. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (*modified by North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008)). As a result, EPA issued a limited disapproval of the Texas regional haze SIP in 2012. 77 Fed. Reg. 33,642, 33,653 (June 7, 2012).[2] EPA did not finalize a FIP for Texas at that time, however, to allow more time for EPA to assess the current Texas SIP submittal "due to the variety and number of BART-eligible sources and the complexity of the SIP." *Id.* at 33,654.

[2] Texas has petitioned the D.C. Circuit for review of the Agency's action. This petition, which was consolidated with others, remains pending. All briefs have been filed, but an argument date has not been set. *Util. Air Regulatory Grp. v. EPA*, Case No. 12-1342 (D.C. Cir.) and consolidated cases.

In 2014, EPA proposed to take action on the remainder of the Texas regional haze SIP. 79 Fed. Reg. 74,818 (Dec. 16, 2014). With respect to BART for EGUs, EPA proposed to rely on EPA's replacement for CAIR, the Cross-State Air Pollution Rule ("CSAPR"), as an alternative to requiring the state's EGUs to install BART. *Id.* at 74,823. Texas and other states, as well as private parties, petitioned for review of CSPAR. In 2015, the D.C. Circuit largely upheld CSAPR, but invalidated and remanded to EPA certain of the rule's emissions budgets, including those for Texas, holding that EPA had "over-controlled" Texas's emissions, requiring greater emissions reductions of certain pollutants than was necessary to mitigate Texas's emissions' effect on downwind states' air quality. *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015).[3] Because the *EME Homer* decision required EPA to reassess the proposed FIP, the Court extended EPA's deadline for final action under the Consent Decree with respect to the BART requirements for EGUs in Texas from December 9, 2015, to September 9, 2017. *See* EPA's Unopposed Motion to Amend the First Partial Consent Decree (Dec. 7, 2015), ECF 85; Order (Dec. 15, 2015) (granting EPA's motion), ECF 86. Consequently, when EPA took final action on its 2014 proposal, EPA deferred action on the Agency's proposed reliance on CSAPR as an alternative to requiring the state's EGUs to install BART. 81 Fed. Reg. 296, 302-03 (Jan. 5, 2016).[4]

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[3] EPA has not yet completed action on the remand.

[4] In this final rule, EPA did partially approve elements of the Texas SIP, including the BART requirements for facilities other than EGUs. EPA disapproved other portions of the Texas SIP and promulgated a FIP to address the requirements pertaining to "reasonable progress, the long-term strategy, and the calculation of natural visibility conditions." 81 Fed. Reg. at 296. Petitions for review of that action were filed with the Fifth Circuit. *State of Texas v. EPA*, No. 16-60118 (5th Cir.). On March 22, 2017, the Court granted EPA's motion for a voluntary remand. EPA has not yet completed its response to the remand.

In January 2017, EPA issued a new proposal that would (1) require certain Texas EGUs to install BART controls (or maintain existing controls) to reduce the emissions of two visibility-impairing pollutants (referred to as "source-by-source controls") and (2) rely on EPA's recent update to CSAPR as an alternative to requiring BART for another visibility-impairing pollutant. 82 Fed. Reg. 912, 945-47 (Jan. 4, 2017).[5] The comment period on EPA's proposal ended on May 5, 2017. 82 Fed. Reg. 11,516 (Feb. 24, 2017). EPA has not yet taken final action on the proposed rule.

III. LITIGATION BACKGROUND

Plaintiffs filed this lawsuit on August 29, 2011, alleging that EPA had failed to perform a non-discretionary duty to promulgate FIPs for Texas and 33 other states within two years of EPA's January 15, 2009, finding. ECF 1. To resolve Plaintiffs' claims, EPA and Plaintiffs entered into a Consent Decree, which this Court entered on March 30, 2012. ECF 21. The Court has extended the deadlines applicable to EPA's obligations under the Consent Decree by granting a series of unopposed motions. ECF Nos. 36, 68, and 71; Minute Order (June 10, 2014); Minute Order (June 15, 2012). On December 15, 2015, this Court entered the most recent amendment to the Consent Decree. ECF 86. This amendment modified Paragraph 4.a.ii[6] to provide in pertinent part that:

[5] Petitions for review of EPA's update to CSPAR are pending in the D.C. Circuit. *State of Wisconsin v. EPA*, Case No. 16-1406 (D.C. Cir.) and consolidated cases.

[6] On August 9, 2017, the Court granted a motion to correct a scrivener's error in the Order as entered in 2015. ECF 91. This quotation includes the correction.

> (a) **No later than December 9, 2016, EPA shall sign a notice of final rulemaking** promulgating a FIP for Texas to meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the BART requirements that were due by December 17, 2007 under EPA's regional haze regulations.
>
> (b) **The December 9, 2016 deadline in subparagraph 'a' for signature of a notice of final rulemaking shall be extended to September 9, 2017, if by December 9, 2016, EPA signs a new notice of proposed rulemaking** in which it proposes approval of a SIP; promulgation of a FIP; partial approval of a SIP and promulgation of a partial FIP; or approval of a SIP or promulgation of a FIP in the alternative, for Texas, that collectively meet the regional haze implementation plan requirements for BART for EGUs that were due by December 17, 2007 under EPA's regional haze regulations.

Id. (emphases added). Because EPA timely signed the notice of proposed rulemaking referenced in Paragraph 4.a.ii.b of the stipulation, 82 Fed. Reg. 912 (Jan. 4, 2017), the deadline for EPA to sign the notice of final rulemaking referenced in Paragraph 4.a.ii.a is now September 9, 2017.

Paragraph 7 of the Consent Decree provides that a request for an extension of any deadline by more than 60 days "may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by Plaintiffs and reply by EPA." EPA's present motion is filed pursuant to Paragraph 7.

For the Court's information, EPA is also moving to extend a deadline in a separate consent decree entered in *Sierra Club v. EPA*, Case No. 10-cv-01541 (CKK). Under that consent decree, by September 9, 2017, EPA is required to promulgate a FIP or approve a SIP that meets the requirements of CAA section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), that implementation plans contain adequate provisions prohibiting emissions that will interfere with

measures in other states related to the protection of visibility for the 1997 ozone and PM2.5 national ambient air quality standards ("NAAQS") (referred to as "visibility transport plans"). EPA has proposed a FIP that would rely on the Agency's proposed BART determinations for the state's EGUs to address visibility transport. 82 Fed. Reg. at 917. *See also* ¶ Decl. 12. Therefore, the Agency, with the approval of the courts, has sought to maintain the same deadline for final action with respect to the implementation plans in both the *Sierra Club* consent decree and the consent decree in the present matter. EPA's motion to amend the Sierra Club consent decree is based on the same grounds as the instant motion to this Court.

STANDARD OF REVIEW

This lawsuit was filed because EPA did not meet a statutory deadline created by Congress. When EPA fails to meet such a deadline, one remedy is for a court to exercise its "equity powers" to establish a schedule for EPA to complete its obligations. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 704-05 (D.C. Cir. 1974). Pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, "[o]n motion and just terms, the court may relieve a party" from such a court-ordered schedule because it is no longer equitable that the judgment should have prospective application.

The Supreme Court has set forth a two-pronged inquiry for Rule 60(b)(5) motions. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992). First, the party seeking modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* Second, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of

such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)) (internal citations omitted); *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."); *Train*, 510 F.2d at 713 n.106 (quoting *Sys. Fed'n No. 91, Ry. Employees v. Wright*, 364 U.S. 642, 647 (1961), stating that "[t]here is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances . . . have changed, or new ones have since arisen.").

A particularly flexible approach to a requested consent decree modification is called for when the decree regulates the conduct of government agencies and affects the public interest. *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000). As the Supreme Court stated in addressing a request to modify a decree governing prison operations, "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381 (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

ARGUMENT

The EPA obligations at issue here arise under Title I of the CAA. Under Title I, Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA,* 427 U.S. 246, 269 (1976). Thus, Congress' plain intent was that the States would take the primary role in developing and implementing implementation plans. *See EME Homer City*, 134 S. Ct. at 1602 n.14; *EME Homer City Generation, L.P. v. EPA*, 795 F.3d at 124) ("The Clean Air Act regulates air quality through a federal-state collaboration"). After EPA entered the Consent Decree at issue here, the Supreme Court, in 2014, observed and reiterated in EME Homer that "cooperative federalism" is

a "core principle" of the CAA. 134 U.S. at 1602 n.14 While Congress did provide for the promulgation of FIPs, it is plain that FIPs are intended to be a back-stop, to be used only when the state in question is unwilling or unable to submit a SIP that can be approved. FIPs are not required until the SIP process has run its course, and they terminate immediately when a SIP revision is approved.

For the reasons explained by Mr. Coleman, in this particular case, the goals of the CAA's visibility provisions and state-first approach with respect to implementation plans can best be met by allowing time for the TCEQ to submit a SIP revision to EPA that addresses the BART requirements for EGUs and for EPA to take final action on that SIP revision. For nearly a decade, states and EPA have sought to rely on the flexibilities inherent in the Agency's interstate trading programs, CAIR and CSAPR, to satisfy the BART requirements for EGUs. Indeed, Texas developed its original regional haze SIP submittal with CAIR in mind, as allowed by the Regional Haze Rule at that time, 77 Fed. Reg. at 33,653, but the D.C. Circuit invalidated CAIR as insufficiently stringent before Texas submitted its SIP. *North Carolina*, 531 F.3d at 929-30. Therefore, EPA published a limited disapproval of this SIP submittal. 77 Fed. Reg. at 33,653. EPA later proposed to rely on CSAPR to satisfy the BART requirements for EGUs in Texas, 79 Fed. Reg. at 74,823, but the D.C. Circuit held that Texas' emissions budgets were too stringent before EPA could finalize its proposal. *EME Homer City*, 795 F.3d at 138.

On January 4, 2017, EPA proposed to address the BART requirements for EGUs in Texas through source-specific control determinations. 82 Fed. Reg. at 945-47. In its comment on that proposal, however, TCEQ indicated that it still prefers the flexibilities inherent in a trading program and believes that it can develop an intrastate trading program that will succeed where efforts to rely on CAIR and CSAPR have failed. Decl. ¶ 13. EPA supports TCEQ's

commitment to develop an intrastate trading program, as the Agency has long supported many states' efforts to rely on trading programs and other alternatives to satisfy the CAA's BART requirements. *See, e.g.*, *WildEarth Guardians v. EPA*, 770 F.3d 919 (10th Cir. 2014) (upholding EPA's approval of regional haze SIPs that established a trading program as a BART alternative for three western states). With this new common purpose in view, TCEQ and EPA have recently developed a more productive working relationship than the agencies have had in many years. Decl. ¶ 19. Many months of cooperative efforts have culminated in TCEQ and EPA signing the August 14, 2017 MOA. *Id.* ¶ 14-15. This is a significant change in the relationship between EPA and the state and represents a unique opportunity to realize the Act's goal of protecting air quality through the cooperative-federalism approach. The Agency and state have in the past been adversaries in litigation. *See e.g.*, *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d at 118. Indeed, EPA's performance of the Consent Decree obligation regarding the BART requirements for EGUs was complicated and delayed in part by that litigation, which involved related final actions. *See supra* 5-6.

The MOA establishes a concrete process and expeditious timeline under which Texas will develop a SIP revision that includes an intrastate trading program as a BART alternative and under which EPA will act upon that SIP revision pursuant to CAA section 110(k)(3), 42 U.S.C. § 7410(k)(3). Specifically, by March 31, 2018, the TCEQ staff will submit to the TCEQ Commissioners a proposed SIP revision that addresses the BART requirements for EGUs through the aforementioned intrastate trading program. Decl. ¶ 16. The proposed SIP revision will also address the interstate pollution transport requirements at issue in the *Sierra Club* discussed *supra* 8-9. Decl. ¶ 16.

EPA will expedite its review of the proposed SIP revision by parallel processing,[7] which means that "if EPA determines that it will propose approval of the Texas SIP submittal, EPA will begin its public notice-and-comment process concurrent with the State's public notice-and-comment process." *Id.* Texas will complete its administrative process consistent with state law and submit the SIP revision to EPA by October 31, 2018. *Id.* Due to the parallel processing, EPA will be able to take final action on the SIP revision by December 31, 2018. *Id.* If EPA does not unconditionally approve the SIP, under the Consent Decree, EPA must either (1) promulgate a FIP or (2) promulgate a partial FIP and unconditionally approve a portion of the SIP so that the BART requirements for EGUs are fulfilled by December 31, 2018.

On August 14, 2017, the Governor of the State of Texas and the Chairman of the TCEQ signed a letter to the Administrator of EPA pledging Texas' resources and affirming their commitment to work with EPA to establish an approved SIP by end of 2018. Abbott Letter; *see also* Decl. ¶ 18.

While a state can submit a SIP revision to replace a FIP at any time, in this instance, it is important that TCEQ be given an opportunity to submit a new SIP revision before EPA finalizes its proposal. As Mr. Coleman explains, "[t]he source-by-source controls in the proposed FIP would require installation of pollution control equipment, likely at a substantial cost." *Id.* ¶ 13. Furthermore, "the planning and lead time to install equipment may be months or years ahead of the actual installation, and certain EGUs could currently be at the stage where they would need to execute planning." *Id.* In contrast, an intrastate trading program would provide the EGUs with the flexibility to purchase allowances rather than install new control equipment. *Id.*

[7] EPA has used parallel processing on a number of occasions in the past. This process does not entail any shortcuts in the rulemaking process. In particular, it does not limit the opportunity for the public to participate as they would in any CAA rulemaking. Decl. ¶¶ 16-17.

In sum, EPA proposes to extend the existing deadline in the Consent Decree for EPA to take final action with respect to the BART requirement for EGUs in Texas from September 9, 2017, to December 31, 2018. Specifically, EPA asks the Court to replace Paragraph 4.a.ii.a and .b with the following:

> No later than December 31, 2018, EPA shall sign a notice of final rulemaking promulgating a FIP for Texas to meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the BART requirements that were due by December 17, 2007 under EPA's regional haze regulations.

EPA's motion satisfies the Rule 60(b) standard for amending a consent decree. First, policy changes legitimately instituted by the new administration led to a breakthrough in the relationship between EPA and Texas, and ultimately to the MOA discussed above. This breakthrough, as well as the Governor's firm commitment to "bring the full weight and resources of the State of Texas to bear on" the development of an approvable SIP revision, Abbott Letter at 1, represent the type of "significant change in circumstances" that warrants relief. *Rufo*, 502 U.S. at 383. Second, "the proposed modification is suitably tailored to the changed circumstances," *id.*, because it seeks to extend the deadline in the Consent Decree by only as much time as is necessary for EPA and TCEQ to carry out the expeditious schedule in the MOA.

CONCLUSION

The Consent Decree should be modified to allow EPA until December 31, 2018, to meet its obligations with respect to the BART requirements for EGUs in Texas.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, MONTANA ENVIRONMENTAL INFORMATION CENTER, GRAND CANYON TRUST, SAN JUAN CITIZENS ALLIANCE, OUR CHILDREN'S EARTH FOUNDATION, PLAINS JUSTICE, POWDER RIVER BASIN RESOURCE COUNCIL, SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND Plaintiffs, v. Scott Pruitt, in his official capacity as Administrator, United States Environmental Protection Agency, Defendant.	CIVIL ACTION NO. 1:11-cv-01548 (ABJ)

I, Samuel J. Coleman, affirm and declare that the following statements are true and correct to the best of my knowledge, information, and belief, under penalty of perjury. These statements are based on my own personal knowledge or on information contained in records of the United States Environmental Protection Agency (EPA), or supplied to me by EPA employees.

1. I am the Acting Regional Administrator of EPA Region 6. I have been employed by EPA since 1989 and I have held this current position since January 2017. As Acting Regional Administrator, I am in charge of the Region 6 office and assure the effective implementation of all EPA programs managed in the Region, including air planning and permitting. I lead a team of career executives in developing strategic objectives and implementation of those strategies to assure protection of human health and the environment in our area of jurisdiction. I oversee all policy areas, and work with the

managers and staff in Region 6 and EPA Headquarters in the furtherance and implementation of policy decisions made by the EPA Administrator. Prior to becoming Acting Regional Administrator of EPA Region 6 in January 2017, I held the position of Deputy Regional Administrator since March 2012, and in this role I supported the Regional Administrator in performing his responsibilities.

I. EPA Region 6 Organization and Responsibilities

2. EPA Region 6, in partnership with the states and tribal nations listed below, is responsible for the oversight or execution of programs implementing federal environmental laws in the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas and for 66 tribal nations.

3. EPA Region 6 is organized into eight Divisions: the Compliance Assurance and Enforcement Division, the Water Quality Protection Division, the Superfund Division, the Management Division, the Office of Regional Counsel, the Office of External Affairs, the Office of Environmental Justice and Tribal Affairs, and the Multimedia Division.

4. EPA Region 6's Multimedia Division includes the Air Program, which is responsible for implementation of the federal Clean Air Act (CAA). The CAA is structured such that States primarily take the lead in designing and adopting plans which provide for the implementation, maintenance and enforcement of standards set under the CAA. 42 USC § 7410(a). The Air Program is responsible for the review of these state implementation plans (SIPs), including in the areas of Texas Regional Haze and Visibility Transport that are the subject of current Consent Decrees (CDs) in *National Parks Conservation Association v. EPA*, No. 1:11-cv-01548 (D.D.C.) and *Sierra Club v. Pruitt*, No. 1:10-cv-01541 (D.D.C.), respectively. These CDs require EPA to

establish requirements for Texas Regional Haze and Visibility Transport by approving SIPs or issuing Federal Implementation Plans (FIPs) by September 9, 2017.

5. The subject matter of *National Parks Conservation Association v. EPA*, No. 1:11-cv-01548 (D.D.C.) is regional haze. As discussed below, CAA Section 169 applies to regional haze and it establishes as a national goal the prevention of any future, and the remedying of any existing, man-made impairment of visibility in 156 national parks and wilderness areas (known as federal Class I areas). The subject matter of *Sierra Club v. Pruitt*, No. 1:10-cv-01541 (D.D.C.) is interstate visibility transport. As discussed further below, CAA Section 110(a)(2)(D)(i)(II) applies to interstate visibility transport and requires that SIPs contain adequate provisions to prohibit interference with measures required to protect visibility in other states.

II. Overview of Regional Haze Program Requirements

6. Section 169A of the CAA required EPA to promulgate regulations requiring Regional Haze SIPs for states with air pollution sources that affect visibility in federal Class I areas (i.e., 156 national parks and wilderness areas). This includes emission limits, schedules of compliance and other measures necessary to make reasonable progress toward meeting the national goal. Under this program, states are responsible for adopting measures in a SIP that will ensure that reasonable progress will be made towards remedying existing visibility impairment and preventing any further degradation. Addressing regional haze is an iterative process and states are required to review and revise their regional haze SIPs approximately every ten years.

7. The CAA also required EPA to promulgate regulations that require major stationary sources (built between August 7, 1962 and August 7, 1977) that emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of

visibility in federal Class I areas, to procure, install, and operate, as expeditiously as practicable the best available retrofit technology (BART) as determined by the state, or by EPA when promulgating a FIP, for controlling emissions from such source for the purpose of eliminating or reducing any such impairment. For the first regional haze SIP that was due in 2007, states were required to address the requirements for BART that apply to certain categories of existing stationary sources.

8. For BART, states are required to determine whether certain types of industrial sources with the potential to emit 250 tons or more of a visibility impairing air pollutant (oxides of nitrogen [NOx], sulfur dioxide [SO_2], or particulate matter [PM]) and built between August 7, 1962 and August 7, 1977 may be reasonably anticipated to impair visibility at Class I areas. For those sources that meet this threshold test, states must then determine appropriate BART controls. That is, the state under a SIP, or in the absence of a SIP, then EPA under a FIP, must determine what technological controls constitute BART controls. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART. See 40 C.F.R. § 51.308(e).

III. Overview of Interstate Visibility Transport Program Requirements

9. When EPA revises a national ambient air quality standard (NAAQS), section 110(a)(2)(D)(i)(II) of the CAA requires each state to ensure that their SIP contains measures to ensure that emissions from within the state do not interfere with the protection of visibility in another state, also known as the Interstate Visibility Transport requirement or the "requirement of section 110(a)(2)(D)(i)(II) with respect to visibility." This requirement dovetails with the regional haze program which

requires, among other things, that states and regional planning organizations identify those Class I areas impacted by each states' emissions. In addition, states must address their contribution to visibility impairment in other states in their regional haze SIP. When a state submits a SIP revision addressing the requirements of Section 110(a)(2)(D)(i)(II) with respect to visibility, EPA must ensure that the SIP revision achieves the necessary control of emissions. EPA has provided guidance that states may use their Regional Haze SIP to address Interstate Visibility Transport. Due to the interrelatedness of Regional Haze and Interstate Visibility Transport, EPA frequently acts on both SIPs submitted by the state at the same time.

IV. EPA Obligations for Texas Regional Haze and Interstate Visibility Transport

10. Under the CD obligations in *National Parks Conservation Association v. EPA*, No. 1:11-cv-01548 (D.D.C.), EPA is required to "sign a notice(s) of final rulemaking promulgating a FIP for Texas to meet the regional haze implementation plan requirements…[or]…sign[] a notice of final rulemaking unconditionally approving a SIP or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations." In January 2016, EPA fulfilled certain parts of its obligation and finalized a FIP addressing, among other things, the CAA's reasonable progress requirements for Texas. See Final Texas Reasonable Progress FIP, 81 *Fed. Reg.* 295 (January 5, 2016). In that final action, EPA also stated it was deferring action on the State's BART determinations. 81 *Fed. Reg.* 295, at 301-302 (January 5, 2016). The parties to this CD agreed upon an amended CD to address that BART piece for Texas, with a compliance date of

September 9, 2017 for EPA to approve a SIP or issue a FIP.

11. Similarly, a separate CD (*Sierra Club v. Pruitt*, No. 1:10-cv-01541 (D.D.C.)) requires EPA to sign for publication in the Federal Register a notice or notices promulgating a FIP, unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a partial SIP, collectively satisfying the requirements of CAA Section 110(a)(2)(D)(i)(II) that implementation plans contain adequate provisions prohibiting emissions that will interfere with measures in other states related to the protection of visibility for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. EPA's January 5, 2016 action included disapproval of interstate visibility transport for these and other NAAQS, but did not finalize a FIP to fill the gap left by that disapproval for the same reason EPA deferred action on BART. 81 *Fed. Reg.* 295, at 302. As to obligations for establishing interstate transport for visibility as to Texas, the parties to this CD agreed upon an amended CD that has a compliance date of September 9, 2017 for EPA to approve a SIP or issue a FIP.

12. As a step toward compliance with the two CDs referenced above, EPA, in its January 4, 2017 proposed rulemaking at 82 *Fed. Reg.* 912 (Jan. 4, 2017), proposed a FIP with source-by source controls for both BART and interstate visibility transport, since EPA had not received from Texas an approvable SIP. The proposed FIP included these four areas: 1) SO_2 BART for coal-fired electric generating units (EGUs); 2) SO_2 BART for oil- and gas-fired EGUs; 3) NO_X BART for all EGUs; 4) PM BART for all EGUs.

13. In response to this January 4, 2017 proposed FIP rulemaking on regional haze and interstate visibility transport, EPA received comments from the State, industry and environmental groups. On May 5, 2017, the State of Texas submitted a comment urging EPA to adopt an intrastate trading program for Texas in lieu of source-by-

source controls, as this approach would comply with the CAA and promote market efficiency while helping to ensure reliability of the deregulated power generating grid in Texas. Texas indicated that a more flexible trading program would better allow managing power supply and grid reliability in light of its concerns over the potential for shutdowns with little advanced notice. The source-by-source controls in the proposed FIP would require installation of pollution control equipment on certain EGUs, likely at a substantial cost. The planning and lead time to install equipment may be months or years ahead of the actual installation, and certain EGUs could currently be at the stage where they would need to execute this planning. By contrast, an intrastate trading program offers a market-based approach that could lead to a more efficient outcome.

V. Preferred Approach to Address the Obligations

14. EPA and the State of Texas have now entered into a Memorandum of Agreement (MOA) to provide for Texas to submit a SIP for an intrastate trading program to meet the applicable BART regional haze and interstate visibility transport requirements that are the subject of the two CDs. See Attachment A. Because of the time needed for Texas to develop the SIP requirements, and for EPA to act on a SIP submittal consistent with public notice and comment requirements, the MOA provides for final action by EPA by December 31, 2018. This MOA builds on Texas' May 5, 2017 letter submitted to EPA as part of the January 4, 2017 proposed rulemaking, urging consideration of an intrastate trading approach. This letter also builds on the overarching intent of the Clean Air Act to allow States to implement this Act through SIPs in lieu of FIPs. To carry out this SIP approach in lieu of a FIP, EPA would need an extension to the two CDs until December 31, 2018.

15. The commitments in the MOA are an outgrowth of a year of concerted effort between EPA and the State of Texas to develop a SIP approach to outstanding Texas regional haze and interstate visibility transport requirements, including the following key steps:

- on August 11, 2016, EPA met with representatives from industry and environmental groups by videoconference to discuss CAA issues including regional haze;
- on September 13, 2016, EPA met with the Texas Commission on Environmental Quality (TCEQ) and representatives from industry and environmental groups in Dallas, Texas to discuss potential options for addressing regional haze;
- on March 28, 2017, EPA met with TCEQ in Austin, Texas to discuss parameters of a potential SIP;
- EPA extended the comment period for the Regional Haze and Visibility FIP proposal;
- in the Spring of 2017, EPA and TCEQ began to conduct weekly conference calls to examine the State's intrastate trading program concept; and
- in the Summer of 2017, these EPA and TCEQ staff conference calls became biweekly.

16. Under the MOA, the State has committed to a schedule to address BART regional haze and interstate visibility transport in a SIP. EPA would be able to expedite its review and decision making. The resulting schedule is:

- TCEQ staff proposes a SIP to the TCEQ Commissioners by March 31, 2018;
- EPA proposes action in parallel;
- Texas submits the SIP to EPA by October 31, 2018 and

- EPA finalizes by December 31, 2018.

In particular, the staff of the TCEQ will submit to the TCEQ Commissioners for their consideration a proposed revision to the Texas SIP that would implement and enforce an intrastate trading program to address the regional haze BART requirements for SO_2, PM, and NOx, and interstate visibility transport requirements for 1997 8-hour ozone, 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2. The Texas SIP revision would be submitted to EPA, allowing EPA to process the revision in parallel with the State's rulemaking process, including an opportunity for public comment on the plan. Parallel process means that if EPA determines that it will propose approval of the Texas SIP submittal, EPA will begin its public notice-and-comment process concurrent with the State's public notice-and-comment process. EPA has previously utilized this parallel process with submissions from states, including the State of Texas.

17. The schedule and process described above is designed to fulfill the legally required procedural requirements for a state adopting and submitting a SIP and for EPA acting upon the SIP submittal as required by the CAA and EPA SIP regulations. Further it is conditioned by the recognition that Texas must submit a SIP that is consistent with the CAA, such that EPA can propose and take action on the submitted SIP.

18. The Governor of the State of Texas, and the Chair of the Texas Commission on Environmental Quality, have provided to the Administrator of EPA an August 14, 2017 letter, which is attached as Attachment B to further show the State of Texas' commitment to establish an approved SIP by end of 2018. The letter provides in part:

> We are committed to working with your administration to create a state implementation plan (SIP) by the end of next year to implement the best available

> retrofit technology (BART) requirements of the Regional Haze Rule. And we want to assure you that we will bring the full weight and resources of the State of Texas to bear on this issue. … After extensive consultation between staff members at TCEQ and EPA, we are confident that the BART SIP can be in place by the end of next year.

19. For the past five years, I have served as Acting Regional Administrator or Deputy Regional Administrator. The recent collaborations between TCEQ and EPA Region 6 have been the closest and most productive discussions in the past five years. The discussions are evidenced by the MOA as well as the willingness of both TCEQ and EPA to engage in very detailed discussions between the parties that have the goal of an approvable SIP.

20. For the reasons stated in this Declaration, EPA requests an extension of the CD schedule until December 31, 2018 to allow the State of Texas to develop and submit, and EPA to review and act on, a SIP that will address the outstanding obligations regarding regional haze BART and interstate visibility transport.

I declare that the above stated matters are true and correct to the best of my knowledge, information, and belief, under penalty of perjury.

Dated: 8/15/17

Samuel J. Coleman
Acting Regional Administrator
EPA Region 6

MEMORANDUM OF AGREEMENT
BETWEEN THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGARDING A STATE IMPLEMENTATION PLAN TO ADDRESS CERTAIN REGIONAL HAZE AND INTERSTATE VISBILITY TRANSPORT REQUIREMENTS PURSUANT TO SECTIONS 110 AND 169A OF THE CLEAN AIR ACT

BACKGROUND

This memorandum of agreement memorializes discussions between staff at the Texas Commission on Environmental Quality ("TCEQ") and the United States Environmental Protection Agency ("EPA"). TCEQ and EPA agree that the regional haze and interstate visibility transport requirements of the Clean Air Act are best met by a state implementation plan ("SIP"), not a federal implementation plan ("FIP"). TCEQ and EPA further agree that this SIP can be and will be implemented quickly and lawfully.

TCEQ and EPA agree that this SIP will meet the best available retrofit technology ("BART") requirements through a new trading program. The foundation of that trading program will be the electric generating units ("EGUs") that the EPA would have subjected to BART in its FIP. *See* 92 Fed. Reg. 921 (Jan. 4, 2017). It is possible that some of these units should not be considered subject to BART, and it is possible that some BART units would be better regulated through source specific requirements. Moreover, some non-BART units may want to opt-in to the trading program. Working closely with EPA, the State through its SIP process will address each of these issues while ensuring that the State's SIP remains consistent with Act's regional haze requirements.

TCEQ and EPA further agree that the allocations to units included in the intrastate trading program should start from the allocations under the Cross-State Air Pollution Rule ("CSAPR"). That is important for the speed of the State's SIP process because it will allow regulators to build on work that EPA already has done. TCEQ and EPA recognize that the CSAPR FIP budget already has been held to be over-control for certain interstate transport requirements. *See EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015). The new trading program will start from the CSAPR unit-level allocations and will preserve flexibility to adjust those allocations where necessary.

EPA and TCEQ further agree to parallel processing of the SIP, which will ensure that the trading program is in place and finalized by the end of next year.

At each step, TCEQ and EPA will work together to determine which units should be included, what the unit level allocations should be, and how the trading program should work. The goal of the parties is that at the end of this process, EPA will be able to determine that Texas has met all outstanding requirements for regional haze under CAA § 169A, including SO_2, PM, and

NO_X BART and interstate visibility transport under CAA § 110(a)(II)(D)(ii) for the 1997 8-hour ozone, 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2 national ambient air quality standards (NAAQS). And this process could serve as a model for cooperative federalism under the Clean Air Act.

NOW, THEREFORE, EPA AND TCEQ AGREE AS FOLLOWS:

1. The executive director of the TCEQ agrees in the spirit of cooperative federalism to submit to the commission for consideration a proposed revision to its SIP to address the outstanding BART and visibility transport requirements.

    a. The executive director agrees to submit a proposed SIP revision for commission consideration no later than March 31, 2018.
    b. TCEQ agrees to coordinate with the owners and operators of potentially impacted EGUs in the State to develop a SIP.
    c. Upon adoption by the commission, TCEQ agrees to submit to EPA for action a revision to its SIP to address the Regional Haze and interstate visibility transport requirements not later than October 31, 2018.
    d. TCEQ intends for this SIP submittal to incorporate trading program flexibilities, to the extent appropriate.
    e. TCEQ intends to ask EPA to parallel process this SIP submittal.
    f. TCEQ intends for this SIP revision to address requirements for regional haze under CAA § 169A for SO_2, PM, and NO_X BART and interstate visibility transport under CAA § 110(a)(II)(D)(ii) for 1997 8-hour ozone, 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2 NAAQS.

2. EPA agrees to parallel process this SIP submittal and intends to sign a final action on the SIP revision by December 31, 2018.

3. TCEQ and EPA intend to work together to meet the goals of this MOA.

4. This document does not establish binding legal requirements on EPA or TCEQ or any of their officers, employees, other representatives, or any other person. EPA retains all the discretion afforded to it under the CAA and the general principles of administrative law. As required by the Antideficiency Act, 31 U.S.C. § 1341 and 1342, all commitments made by EPA herein are subject to the availability of appropriated funds. Nothing in this document in and of itself obligates EPA to expend appropriations or to enter into any contract, assistance agreement, or interagency agreement, or to incur other financial obligations. This document does not create any exemption from policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this document will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

5. All commitments made by TCEQ in this agreement are subject to Texas law, including but not limited to the Government Code, the Water Code, the Texas Health and Safety Code, and the General Appropriations Act. Nothing in this agreement requires TCEQ to expend funds in violation of Texas law.

6. This MOA may be signed in counterparts.

7. This MOA will terminate upon EPA's final rulemaking action on TCEQ's SIP submittal.

Signed this 14th day of August 2017.

Richard A. Hyde, P.E.
Executive Director
Texas Commission on
Environmental Quality

Samuel Coleman, P.E.
Acting Regional Administrator
United States Environmental
Protection Agency, Region 6

August 14, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Pruitt:

On behalf of the State of Texas, we commend you for your commitment to restoring the principles of cooperative federalism under the Clean Air Act. We are committed to working with your administration to create a state implementation plan (SIP) by the end of next year to implement the best available retrofit technology (BART) requirements of the Regional Haze Rule. And we want to assure you that we will bring the full weight and resources of the State of Texas to bear on this issue.

As you know, Congress intended the Clean Air Act to be "[a]n experiment in cooperative federalism." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation marks omitted). The act gave the Environmental Protection Agency (EPA) the power to identify pollutants and set air quality standards. And Congress gave states "the primary responsibility for implementing those standards." *Id.* (internal quotation marks omitted); *see* 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within [its] entire geographic area."); *id.* § 7401(a)(3) ("[A]ir pollution prevention . . . is the primary responsibility of States and local governments.").

The principal way states implement air quality standards is through SIPs. The states have "wide discretion" in formulating those plans. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). And the Clean Air Act provides that EPA "shall approve" a SIP "if it meets the applicable requirements of this chapter." 42 U.S.C. § 7410(k)(3). Only where the state fails to meet those requirements does EPA gain the power to issue a federal implementation plan (FIP). *Id.* § 7410(c)(1). As the Fifth Circuit recently observed in a related case involving the Regional Haze Rule, "[t]he structure of the Clean Air Act indicates a congressional preference that states, not EPA, drive the regulatory process." *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016).

We agree with you that, in recent years, this regulatory process has become both uncooperative and unproductive. Take first the uncooperativeness. Between January 2009 and January 2017, EPA imposed 56 FIPs. That is more than 10 times as many FIPs as were issued in the three

preceding presidential administrations combined. EPA and Texas agree that imposing another FIP here would further unsettle the cooperative federalism that Congress intended to foster in the act.

We also agree that the Cross-State Air Pollution Rule (CSAPR) and the Regional Haze Rule prove that FIPs can be unproductive. In 2011, EPA imposed a CSAPR FIP on 27 states, including Texas, to limit the cross-state transport of certain air pollutants. That approach resulted in years of protracted litigation, and ultimately, the D.C. Circuit held that the Texas FIP was illegal and remanded the issue back to EPA. *See EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

Similarly, in January 2016, EPA disapproved the Reasonable Progress portion of the Texas Regional Haze SIP and imposed a Regional Haze FIP on Texas. That FIP set "reasonable progress goals" that Texas must meet to restore natural visibility at two national parks and one federal wildlife refuge by 2064. EPA imposed that FIP because it concluded that Texas' reasonable-progress calculations were off by between 0.18 percent and 0.65 percent. And as a consequence of that "error," EPA's FIP would have required scrubber upgrades and retrofits at 15 electricity generation facilities at a cost of $2 billion. The Fifth Circuit stayed that FIP and remanded it to EPA, again returning everyone to the drawing board. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

We agree with you that it is time to break the FIP-stay-remand cycle. Staff members in your office and at the Texas Commission on Environmental Quality (TCEQ) have been working together for months to implement the Regional Haze Rule in accordance with binding directions from the Fifth and D.C. Circuits. And rather than doing so through yet another FIP — this one to implement the BART requirement — we agree that a SIP provides a better path forward.

We think the BART SIP process should be motivated by three principles. The first is speed. Everyone wants to see clear rules in place as soon as possible. Citizens and environmental groups want to see measurable progress toward natural visibility. Power generators want certainty in their budgets. And consumers want to know their power grid is reliable. This all requires that this SIP be proposed and finalized faster than normal. After extensive consultation between staff members at TCEQ and EPA, we are confident that the BART SIP can be in place by the end of next year.

The second principle is cooperation. Much of the delay associated with the Regional Haze Rule — and CSAPR — stems from a lack of federal-state cooperation, both inside and outside the courtroom. We want to change that and to work collaboratively to establish a trading program that satisfies the BART and interstate visibility transport requirements. As part of that cooperation — and as a further measure to speed up this SIP process — the Texas BART SIP will ask for "parallel processing" by EPA under 40 C.F.R. Part 51, Appendix V.2.3.

Law is the third principle that will motivate this SIP process. The Fifth Circuit held that even without a Regional Haze BART SIP in place, Texas is already under the glide path that both the

state and EPA calculated for restoring natural visibility. *See Texas*, 829 F.3d at 414-15; *see also* 79 Fed. Reg. at 74,887 (finding that measured visibility already exceeds reasonable progress goals under both Texas' 2009 SIP and EPA's FIP). We recognize the Fifth Circuit's decision means Texas and EPA will need to work together to fix the problem of over-control.

At the end of the day, we are confident the state and EPA together will create a regulatory program that is good for the air, good for the citizens of Texas and other states, fair to our state's power generators, and that satisfies the legal requirements of the Clean Air Act. We commend you for your commitment to working with the states rather than against them. And we look forward to working with you on this important project.

Sincerely,

Greg Abbott
Governor

Bryan W. Shaw, Ph.D., P.E.
Chairman
Texas Commission on Environmental Quality

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, MONTANA ENVIRONMENTAL INFORMATION CENTER, GRAND CANYON TRUST, SAN JUAN CITIZENS ALLIANCE, OUR CHILDREN'S EARTH FOUNDATION, PLAINS JUSTICE, POWDER RIVER BASIN RESOURCE COUNCIL, SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND Plaintiffs, v. SCOTT PRUITT, in his official capacity as Administrator, United States Environmental Protection Agency, Defendant.	CIVIL ACTION NO. 1: 11-cv-01548 (ABJ)

ORDER

Upon consideration of the Motion to Amend the Consent Decree filed by Defendant Scott Pruitt, Administrator, United States Environmental Protection Agency ("EPA"), and the memoranda in support of and in opposition thereto, it is hereby ordered that the motion is granted. The Court's Order of December 15, 2015 (ECF 86) as corrected by Order of August 9, 2017, ECF 91, shall be amended to delete Paragraph 4.a.ii.a and b and substitute the following provision:

> No later than December 31, 2018, EPA shall sign a notice of final rulemaking promulgating a FIP for Texas to meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional

approval of a portion of a SIP, that collectively meet the BART requirements that were due by December 17, 2007 under EPA's regional haze regulations.

Executed this ___ day of _____, 2017.

_____
HON. AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE